

Mar 21, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VICTOR MANUEL ANGULO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 4:14-CR-6014-EFS
[No. 4:17-CV-5208-EFS]

**ORDER MEMORIALIZING
EVIDENTIARY HEARING
FINDINGS AND DENYING § 2255
MOTION**

On March 11 and 12, 2019 the Court held an evidentiary hearing regarding Defendant Victor Manuel Angulo's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, ECF Nos. 238 & 261. Mr. Angulo claimed that he was deprived of his Sixth Amendment right to assistance of counsel because: (1) counsel Jim Egan failed to accurately advise Mr. Angulo of the potential sentencing consequences of a four-point sentencing enhancement for an obliterated serial number;¹ and (2) Mr. Egan failed to convey a plea offer of 36–48 months to Mr. Angulo.² At the conclusion of the evidentiary hearing, the Court made factual findings and denied Mr. Angulo's § 2255 Motion because Mr. Angulo failed to show

¹ ECF No. 238 at 24–26.

² ECF No. 261 at 1–3.

1 that Mr. Egan's performance fell below an objective standard of reasonableness.³ The
2 Court now issues this Order memorializing the Court's findings, which are
3 supplemented and corrected where necessary.

4 I. Background

5 On December 25, 2013, the Pasco Police Department dispatched officers to a
6 possible domestic disturbance at a residence after a man called 911 on his daughter's
7 boyfriend, Mr. Angulo.⁴ Mr. Angulo had a no contact order with the man's daughter
8 that included the residence as a protected address.⁵ Mr. Angulo had reportedly left
9 the residence with a firearm.⁶ Mr. Angulo was spotted two blocks from the residence
10 and was arrested.⁷ Officers found a bullet in Mr. Angulo's pants.⁸ They also found a
11 firearm in a nearby garbage can—the firearm had an obliterated serial number.⁹ The
12 bullet found on Mr. Angulo matched the ammunition loaded in the firearm.¹⁰

13 On April 8, 2014, Mr. Angulo was indicted for the offense of Felon in
14 Possession of a Firearm and Ammunition, in violation of 18 U.S.C. § 922(g)(1).¹¹ On
15 April 28, 2014, Rick Hoffman appeared as counsel for Mr. Angulo.¹² However, on
16 May 27, 2014, the Court found that an irreconcilable breakdown in communication
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15 ³ *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 688
16 (1984)).

17 ⁴ ECF Nos. 238 at 4–5 & 248 at 2–3.

18 ⁵ ECF No. 245 at 5.

⁶ ECF No. 248 at 9.

⁷ ECF Nos. 238 at 6, 244 at 5 & 245 at 5.

⁸ ECF Nos. 238 at 7.

⁹ ECF Nos. 238 at 7 & 245 at 6.

¹⁰ ECF No. 245 at 7.

¹¹ ECF No. 22.

¹² ECF No. 12.

1 had occurred between Mr. Angulo and Mr. Hoffman and permitted Mr. Hoffman to
2 withdraw.¹³ Mr. Egan was appointed to represent Mr. Angulo on May 29, 2014.¹⁴

3 Mr. Angulo did not accept a plea agreement and had a jury trial on March 9,
4 2015.¹⁵ At the conclusion of the evidence, the Court and the parties discussed jury
5 instructions.¹⁶ The Court specifically questioned the parties regarding ambiguity in
6 the jury verdict form proposed by the Government's former Assistant United States
7 Attorney, Mary K. Dimke.¹⁷ The form made no distinction between a finding of
8 possession of ammunition versus possession of a firearm.¹⁸ Rather, it simply asked
9 the jury to make a finding of "possession of ammunition and/or a firearm," then
ended with the phrase "with all of us agreeing as to the firearm and/or the particular
ammunition possessed."¹⁹ Mr. Egan did not object.²⁰

10 Mr. Angulo was found guilty.²¹ At sentencing, Mr. Egan argued the Court
11 could not impose a four-point sentencing enhancement for an obliterated serial
12 number because the ambiguous jury verdict did not establish that the jury found
beyond a reasonable doubt that Mr. Angulo possessed a firearm.²² Ultimately, the

13 ¹³ ECF No. 66.

14 ¹⁴ ECF No. 67.

15 ¹⁵ ECF No. 150.

16 ¹⁶ ECF No. 238 at 8.

17 ¹⁷ *Id.*

18 ¹⁸ *Id.*

19 ¹⁹ *Id.*

20 ²⁰ *Id.*

21 ²¹ ECF No. 165.

22 ²² The sentencing hearing transcript reads:

17 Your Honor, the PSR increases the score from 20 to 24 on the basis that the serial
18 number on the gun was obliterated. First, the gun was not part of - - there was no bases
for the court to find that the - - beyond a reasonable doubt, the jury to find beyond a
reasonable doubt that the gun was part of the conviction. . . . I think that it is—it
should be judged on a beyond a reasonable doubt. It is a specific offense characteristic
as to whether or not this should be added.

1 Court found the enhancement appropriate because a preponderance of evidence
2 established that Mr. Angulo possessed a firearm with an obliterated serial number.²³
3 The Court sentenced Mr. Angulo to 92 months in prison, which was at the bottom of
4 his 92–115 month United States Sentencing Guideline (“Guidelines”) range.²⁴ At the
5 conclusion of the sentencing hearing, Mr. Angulo asserted that had he known the
6 sentencing Guideline range would be so high he would have accepted the plea
agreement offered earlier by the Government.²⁵

7 **II. Procedural History**

8 Mr. Angulo appealed his conviction.²⁶ The Court of Appeals for the Ninth
9 Circuit held that it could not review the issue of whether Mr. Egan erred in not
10 objecting to the jury verdict, because counsel invited any error.²⁷ The Court declined
11 to reach the issue of whether Mr. Egan was ineffective.²⁸ Mr. Angulo did not file
certiorari.

12 On December 14, 2017, Mr. Angulo filed a motion under 28 U.S.C. § 2255.²⁹
13 The Court referred the matter to Magistrate Judge John Rodgers for appointment of
14 counsel.³⁰ Magistrate Judge Rodgers appointed Robin Emmans to represent
Mr. Angulo.³¹

15 ECF No. 210 at 16–17.

23 ECF No. 210 at 21–22. *See* U.S.S.G. § 6A1.3, Commentary.

24 ECF Nos. 190 & 191.

25 ECF No. 210 at 28–29 (“I was offered five years originally, and I should have taken advantage of
this offer, would have I known (sic) of this immense time I was looking at”).

26 ECF No. 195.

27 ECF No. 212.

28 *Id.*

29 ECF Nos. 215 & 216.

30 ECF No. 219.

31 ECF No. 220.

1 On August 13, 2018, Ms. Emmans filed Mr. Angulo’s Amended § 2255
2 Motion.³² Mr. Angulo’s Motion requested an evidentiary hearing regarding his claim
3 that he had been deprived of his Sixth Amendment right to effective counsel.³³
4 Mr. Angulo alleged that Mr. Egan incorrectly advised him of the sentencing
5 consequences of a loss at trial versus the acceptance of the Government’s plea
6 agreement.³⁴ Specifically, he argued that Mr. Egan failed to take into account a four-
7 point sentencing enhancement for the obliterated serial number.³⁵ Mr. Angulo
8 asserted that Mr. Egan predicted a 70 month sentence if he went to trial.³⁶ At
9 sentencing, the Court found that Mr. Angulo’s Guideline range was 92–115 months,
10 including the four-point enhancement.³⁷ Subtracting the four-point enhancement
11 results in a Guideline range of 63–78 months.³⁸ Mr. Angulo reasoned that Mr. Egan’s
12 70 month prediction falls into the 63–78 month Guideline range, and therefore, that
13 Mr. Egan did not account for the four-point enhancement.³⁹ Mr. Angulo claimed that
14 the difference between the sentence received, 92 months, and the sentence predicted,
15 70 months, “directly caused” him to reject the Government’s plea offer.⁴⁰

15 ³² ECF No. 238. Mr. Angulo also asserted several other claims, but the Court determined that none warranted further review. ECF No. 252.

16 ³³ ECF No. 238 at 24–26.

17 ³⁴ *Id.*

18 ³⁵ *Id.*

³⁶ *Id.* at 26.

³⁷ See ECF Nos. 191 (listing his total offense level as “24,” criminal history category as “V,” and Guideline range as “92–115 months”). See also ECF No. 210 at 21 (finding that a four point enhancement for an obliterated serial number was appropriate based on a preponderance of the evidence).

³⁸ See U.S.S.G. § 5.A (sentencing table).

³⁹ ECF No. 238 at 24–26.

⁴⁰ ECF No. 238 at 26.

1 On September 20, 2018, the Government filed a response.⁴¹ The Government
2 argued that Mr. Angulo could not succeed on an ineffective assistance of counsel
3 claim because Mr. Angulo had not shown that: a plea agreement would have been
4 presented to the Court; the Court would have accepted it; and the penalty would
have been less severe than the one imposed.⁴²

5 On September 27, 2018, Mr. Angulo filed a reply asserting that Ms. Emmans
6 was unable to access communications between the Government's former AUSA
7 Dimke and Mr. Egan.⁴³ Ms. Emmans reiterated that an evidentiary hearing was
warranted.⁴⁴

8 On October 26, 2018, the Court determined that an evidentiary hearing was
9 warranted because the validity of Mr. Angulo's claim relied on information outside
10 the courtroom.⁴⁵

11 On February 26, 2019, the Government filed witness and exhibit lists.⁴⁶ The
12 exhibits included emails between former AUSA Dimke and Mr. Egan. The emails
13 indicated that on June 12, 2014 AUSA Dimke emailed Mr. Egan stating that "the
14 last offer conveyed to Rick Hoffman, your client's prior counsel, will remain open
15 until July 11, 2014." The Government proposed the following plea deal: (1) if
16 Mr. Angulo plead guilty to Count 1 the Government would move for a three level
departure, resulting in a Guideline range of 77–96 months; or (2) if Mr. Angulo

17 ⁴¹ ECF No. 245.

⁴² ECF No. 245 at 19–20.

⁴³ ECF No. 246 at 6.

⁴⁴ *Id.*

⁴⁵ ECF No. 252 at 6.

⁴⁶ ECF Nos. 257 & 258.

1 admitted to possession of the firearm the parties would agree to a range of 48–60
2 months as either a Rule 11(c)(1)(C) or Rule 11(c)(1)(B) plea agreement. The email
3 also stated: “there is a four point increase because the serial number was
obliterated.”

4 On January 13, 2015, AUSA Dimke again emailed Mr. Egan inquiring
5 whether settlement discussions were a possibility. On January 15, 2015, Mr. Egan
6 stated “I will check with my client and get back to you.” On January 16, 2015 at 3:46
7 p.m., Mr. Egan emailed AUSA Dimke stating “Mr. Angelo (sic) will pled (sic) to a
8 crime that does not include a gun. He has served almost 1 year and would like a 11c
1 C (sic) for time served.” On January 16, 2015, at 3:51 p.m., AUSA Dimke
9 responded: “I would be willing to recommend to (sic) a plea agreement to the
10 ammunition, instead of the gun. I was thinking a range of 36-48 months.” On
11 January 17, 2015, at 1:15 p.m., Mr. Egan responded: “No thank you.”

12 Six days after the Government filed it’s witness and exhibit lists, Mr. Angulo
13 filed his “Addendum to Amended 28 U.S.C. § 2255” raising an additional ground for
14 relief.⁴⁷ Mr. Angulo stated that he reviewed the Government’s exhibits and was
15 distressed to see the January 2015 plea offer of 36–48 months.⁴⁸ Mr. Angulo asserted
16 that Mr. Egan never told him about the offer and that had it been conveyed he would
17 have accepted it—even against an incorrect sentence prediction of 70 months.⁴⁹

18 ⁴⁷ See generally ECF No. 261.

⁴⁸ Id. at 2–3.

⁴⁹ Id. at 3.

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The Government and Mr. Angulo called Mr. Egan as a witness at the evidentiary hearing.⁵¹ Mr. Egan advised the Court that he is 76 years old and his memory is fading. He estimated that he met with Mr. Angulo 10–15 times. Although he had no specific memory of discussing the Guideline calculations,⁵² he remembered discussing the potential penalties of going to trial versus pleading guilty. He also remembered discussing the obliterated serial number enhancement “backwards and forwards” with Mr. Angulo. Mr. Egan’s strategy regarding the enhancement was to utilize the ambiguous jury instruction to later argue at sentencing that the evidence did not show that the enhancement should apply.

ECF Nos. 262 & 264.

See ECF Nos. 257 & 259. The Court directed the parties to provide briefing as to waiver of attorney-client privilege between Mr. Angulo and Mr. Egan, as well as between Mr. Angulo and former counsel Mr. Hoffman. ECF No. 252. “Where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer.” *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir.2003). Mr. Angulo agreed that the attorney-client privilege between himself and Mr. Egan had been waived. *See* ECF No. 256 at 2. However, Mr. Angulo stated that as to Mr. Hoffman, “Mr. Angulo raises no claims, and no waiver is implied.” *Id.*

Mr. Egan also stated that it was his common practice to review the Guideline range with his clients using a plastic card.

1 believed to be the “devastating” potential consequences of a jury trial. Despite having
2 told Mr. Angulo that the Government had a strong case, Mr. Egan recalled that
3 Mr. Angulo wanted to go to trial unless he was offered a plea deal for a time-served
4 sentence. Mr. Egan stated that he would only reject plea offers upon Mr. Angulo’s
5 instruction. Ms. Emmans also questioned Mr. Egan about his wife’s illness during
6 the time he represented Mr. Angulo. Mr. Egan stated that caring for his ill wife
would not have impeded his ability to convey the offer to Mr. Angulo.

7 Mr. Angulo also testified at the evidentiary hearing, reiterating the
8 arguments in his Motion. He elaborated that Mr. Egan had told him that the
9 Government’s case was strong. Mr. Angulo also stated that, unlike Mr. Egan
10 testified, he wanted a plea deal with credit for time served—not a plea deal for a
11 time-served sentence. Finally, Mr. Angulo testified that he had known other inmates
12 who received lower sentences of two to three years for the same charge. He stated
that in comparison to the other inmates’ criminal history his was “nothing.”
Therefore, he wanted a comparatively low sentence.

13 IV. Findings and Conclusions

14 Mr. Angulo has not shown that his right to effective assistance of counsel was
15 violated because he failed to show that Mr. Egan’s performance fell below an
16 objective standard of reasonableness.⁵³ Criminal defendants have the right to
17 assistance of counsel under the Sixth Amendment, including at the plea bargaining

18 ⁵³ The burden is on Mr. Angulo to show that his counsel was ineffective by a preponderance of
evidence. *United States v. Lord*, 711 F.2d 887, 891 n.3 (9th Cir. 1983); *Farrow v. United States*,
580 F.2d 1339, 1355 (9th Cir. 1978) (citations omitted).

1 phase.⁵⁴ To succeed on an ineffective assistance of counsel claim, Mr. Angulo must
2 demonstrate that his claim meet both prongs of the *Strickland v. Washington* test:
3 (1) that counsel’s representation fell below an objective standard of reasonableness
4 (the “performance” prong); and (2) that but for counsel’s error, there is a reasonable
5 probability that the result of the proceeding would have been different (the
6 “prejudice” prong).⁵⁵ To show prejudice in a plea bargaining context, Mr. Angulo
7 must show that the outcome of the plea process would have been different with
8 competent representation.⁵⁶ Mr. Angulo’s claim does not meet the performance
9 prong because Mr. Egan conveyed all plea offers to Mr. Angulo and did not
10 inadequately counsel him regarding sentencing consequences.

11 Mr. Angulo has not shown that Mr. Egan failed to inform him of the four-point
12 enhancement for the obliterated serial number. Effective assistance of counsel
13 includes accurately informing a criminal defendant of sentencing consequences,
14 which would include possible sentencing enhancements.⁵⁷ The Court found that
15 Mr. Egan thoroughly discussed the four-point enhancement for the obliterated serial

14 ⁵⁴ *Lafler v. Cooper*, 566 U.S. 156, 163 (2012).

15 ⁵⁵ *Id.* at 162–63 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

16 ⁵⁶ *Id.* at 163.

17 ⁵⁷ *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) (“Because an intelligent assessment of the relative
18 advantages of pleading guilty is frequently impossible without the assistance of an attorney,
counsel have a duty to supply criminal defendants with necessary and accurate information.”).
See United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) (“Knowledge of the comparative
sentencing exposure between standing trial and accepting a plea offer will often be crucial to the
decision whether to plead guilty”); *Crawford v. Fleming*, 323 F. Supp. 3d 1186 (D. Or. 2018) (“In
the context of a plea offer, counsel must reasonably investigate and assess the potential
consequences and sentencing ramifications to ensure that a defendant makes an informed
decision whether to accept or reject a plea offer.”). *See Also* WSBA, Performance Guidelines for
Criminal Defense Attorneys, Guideline 8.2, Sentencing Options, Consequences and Procedures,
[https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-
defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1_2](https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/perf-guidelines-for-criminal-def-rep-060311.pdf?sfvrsn=c2e43cf1_2)

1 number with Mr. Angulo and strategically discussed the Guidelines with his client,
2 based on what he knew. The June 12, 2014 email supported this finding, because it
3 was evidence that Mr. Egan was aware of the four-point enhancement mentioned by
4 AUSA Dimke. Further, although Mr. Egan did not remember the specific dates he
5 discussed the four-point enhancement with Mr. Angulo, he remembered it being a
6 key issue in the case and discussing it with Mr. Angulo frequently. He also recalled
7 making a specific strategic decision to use the ambiguous jury verdict to argue at
8 sentencing that the enhancement should not apply.

9 Mr. Angulo has not shown that Mr. Egan failed to communicate the January
10 2015 plea offer of 36–48 month to Mr. Angulo. Effective assistance of counsel
11 includes conveying all plea offers to the defendant.⁵⁸ The Court made the following
12 factual findings: although the January 2015 email from AUSA Dimke was not a
13 formal offer, it was enough of an informal offer that Mr. Egan should have conveyed
14 it to his client;⁵⁹ Mr. Egan did communicate the January 2015 plea offer of 36–48
15 months to Mr. Angulo; Mr. Angulo rejected the offer; and Mr. Egan conveyed
16 Mr. Angulo’s rejection of the offer to AUSA Dimke. Mr. Egan’s testimony supported
17 the Court’s factual findings. Mr. Egan testified that he encouraged Mr. Angulo to
18 take a plea deal many times, and desired greatly to help Mr. Angulo avoid the
“devastating” consequences of trial. However, Mr. Angulo wanted a time-served

⁵⁸ *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012).

⁵⁹ In closing, the Government argued that the emails did not reflect a true offer that needed to be communicated to Mr. Angulo. However, Mr. Egan stated that he believed the email to be a true offer, therefore, the Court believed it was one that would have been necessary to communicate to Mr. Angulo.

1 sentence. The Court also found that Mr. Angulo's testimony that he wanted to
2 receive a lower sentence, as other inmates did, supported the Court's factual
3 findings. Ultimately, this led the Court to conclude that Mr. Angulo was dissatisfied
4 with the Government's offers, in light of what he believed to be his minimal criminal
5 history.

6 In addition to the reasons articulated above, the Court carefully observed the
7 body language, mannerisms, tones, and expressions of Mr. Egan and Mr. Angulo
8 while testifying. Based on these observations, as well as the actual testimony and
9 admitted evidence, the Court found Mr. Egan credible and Mr. Angulo not credible.
10 Finally, the Court found Mr. Egan's testimony credible because he based his
11 testimony on 40 years of his regular practice as a criminal defense attorney. His
12 testimony was further strengthened by the fact that he was effective in all other
13 aspects of the trial—he was a zealous advocate who strategically determined that a
14 more generalized verdict would be better for Mr. Angulo's defense. Although Mr.
15 Egan experienced some memory difficulties, he stated that as he continued to testify
16 his memory was continually refreshed. He was able to recall events with more
17 specificity as his testimony went on.

18 Finally, the Court found Mr. Angulo not credible based on the totality of the
circumstances of this case. During Mr. Angulo's jury trial, the Court was concerned
that Mr. Angulo had encouraged his sister to commit perjury. Mr. Angulo's sister,
Maria Bauxbaum, was intended to be a witness for the defense until the Government
asserted that it had obtained jail phone call recordings of Mr. Angulo encouraging

1 his reluctant sister to testify as to certain matters, and reassuring her that she would
2 not be charged with perjury.⁶⁰ The Court was persuaded that Ms. Bauxbaum needed
3 counsel, and appointed Samuel Swanberg to represent her.⁶¹ Ms. Bauxbaum
4 consulted with Mr. Swanberg, who reported that if his client was called, she would
5 take the Fifth Amendment.⁶² Ms. Bauxbaum was ultimately not called as a witness
at Mr. Angulo's trial.

6 **V. Conclusion**

7 Mr. Angulo has not shown that his counsel's performance fell below an
8 objectively reasonable standard. Therefore, his claim for ineffective assistance of
counsel fails. Accordingly, **IT IS HEREBY ORDERED:**

- 9 1. Defendant Victor Angulo's Motion under 28 U.S.C. § 2255 to Vacate,
10 Set Aside, or Correct Sentence, **ECF No. 238**, is **DENIED**.
- 11 2. **The Clerk's Office**, pursuant to Federal Rule of Civil Procedure 58(a),
12 is directed to **ENTER JUDGMENT** for the Government in the civil file
No. 4:17-CV-5208-EFS.
- 13 3. This file shall remain closed.
- 14 4. The Court **issues a certificate of appealability** on the issue of
15 whether Angulo is entitled to relief based on his ineffective assistance
16 of counsel claims.

18 ⁶⁰ ECF No. 207 at 57–80.

⁶¹ *Id.* at 535–538.

⁶² ECF No. 208 at 10–11.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order, enter judgment for the Government, and then provide copies to current and former counsel.

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DATED this 21st day of March 2019.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge